Malaysian Newsprint Industries Sdn Bhd v Stephen Cheah Kim Seng

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R3(2)–25–36 OF 2006
MOHAMAD ARIFF J
22 JANUARY 2010

Labour Law — Employment — Dismissal — Constructive dismissal — Transfer — Whether facts submitted showed respondent was demoted by his transfer

Labour Law — Industrial Court — Award — Failure to consider Practice Note No 1 of 1987 — Error in calculating amount of award — Whether high back wages supported by valid reasons

This was an application for an order of certiorari to quash Industrial Court award. The respondent was employed as the manager for the applicant company's Recovered Paper Division ('RPD'). The respondent reported directly to the company's managing director. A domestic inquiry was convened after several allegations of misconduct made against the respondent who subsequently was found guilty of nine out of 19 charges of misconduct. The applicant's company deemed that the alleged misconduct committed warranted dismissal but the respondent was transferred to a newly created position of commercial manager-marketing with a proper job description. The respondent was informed that his salary, grade and other terms and benefits remained the same. The respondent reported for duty and assuming his new position and worked for three days before he informed the applicant's company that he considered himself as having been constructively dismissed on the basis that the transfer allegedly amounted to a demotion and did not accept the findings of the enquiry. The respondent submitted that compared to his previous position the newly created position came with reduction of responsibility and he was no longer a member of the senior management executive committee of the company. The Industrial Court chairman concluded that the respondent was constructively dismissed without just cause and excuse which was clearly a breach of contract by the appellant that went to the root of the contract of the employment. As reinstatement of the respondent was deemed not appropriate, the respondent was awarded forty-eight months salary compensation. The appellant argued, inter alia, (i) that the learned Industrial Court chairman had considered the motives of the company when the respondent was transferred by the appellant to the new position; and (ii)

that the award of the back wages was excessive and it conflicted with the general practice of the Industrial Court.

Held, allowing the application:

(1) Although it is accepted law that the employer has the prerogative to transfer its employees from one place of work to another, this discretion was not unlimited and can be tested on the grounds whether it is actuated by indirect motive or mala fide, whether it was made for the purpose of harassing and victimising of the worker. However, it could not be said that the findings of fact on the evidence by the Industrial Court were not findings that a reasonable tribunal similarly circumstanced would not have arrived at (see para 12).

(2) The award of back wages of 48 months was an error of law which should be corrected since the learned Industrial Court chairman had failed to recognise and apply the general trend of cases and the relevant Practice Note No 1 of 1987 which was applicable to the facts of the case. The high award of back wages of 48 months was unsupported by valid reason. It would be fair to limit the award of back wages to the established practice of awarding 24 months and to consider the right amount of compensation to be awarded for the loss of employment. The respondent who was employed by the company as a manager for the RPD in 1996 as was constructively dismissed in 1999; hence it would be fair to award some sum as compensation for loss of employment on the basis of one month's salary on year of service (see para 13).

[Bahasa Malaysia summary

Ini adalah permohonan untuk mendapatkan suatu perintah certiorari bagi membatalkan award Mahkamah Perusahaan. Responden telah bekerja sebagai pengurus bagi *Recovered Paper Division* ('RPD') di syarikat pemohon. Responden melaporkan diri secara langsung kepada pengarah urusan syarikat. Satu siasatan domestik telah diadakan selepas beberapa dakwaan salah laku dibuat terhadap responden yang kemudiannya telah didapati bersalah atas sembilan daripada 19 tuduhan salah laku. Syarikat pemohon menyifatkan salah laku yang didakwa tersebut wajar dikenakan pemecatan wajar, tetapi responden telah dipindahkan ke jawatan yang baru diwujudkan iaitu pengurus pemasaran perdagangan dengan deskripsi kerja yang sepatutnya. Responden telah diberitahu bahawa gaji, gred dan lain-lain terma dan faedah sama, kekal. Responden melaporkan diri untuk bertugas dan mengambil alih jawatan barunya dan bekerja selama tiga hari sebelum dia memaklumkan kepada syarikat pemohon bahawa dia menganggap dirinya seperti telah dibuang kerja secara konstruktif atas dasar bahawa pemindahan tersebut didakwa terjumlah kepada penurunan pangkat dan tidak menerima hasil siasatan tersebut. Responden berhujah bahawa berbanding dengan kedudukannya sebelum ini jawatan baru diwujudkan bersama dengan pengurangan tanggungjawab dan

dia tidak lagi menjadi ahli jawatankuasa eksekutif pengurusan kanan syarikat. Pengerusi Mahkamah Perusahaan menyimpulkan bahawa responden telah dibuang kerja secara konstruktif tanpa alasan dan sebab yang adil yang mana adalah secara jelas, pelanggaran kontrak oleh perayu yang merujuk kepada asas kontrak pekerjaan. Oleh kerana pengembalian semula responden dianggap tidak sesuai, responden telah diawardkan pampasan 48 bulan gaji. Perayu berhujah, antara lain (i) bahawa Pengerusi Mahkamah Perusahaan yang arif telah mempertimbangkan motif-motif syarikat tersebut apabila responden telah dipindahkan oleh perayu kepada jawatan baru; dan (ii) bahawa award gaji kebelakangan adalah berlebihan dan ia bertentangan dengan amalan am Mahkamah Perusahaan.

Diputuskan, membenarkan permohonan.

(1) Walaupun diterima di sisi undang-undang bahawa majikan mempunyai hak untuk memindahkan pekerja dari satu tempat kerja ke yang lain, budi bicara ini adalah tidak terhad dan boleh diuji atas alasan sama ada ia digerakkan oleh motif yang tidak langsung atau mala fide, sama ada ia telah dibuat bertujuan mengganggu dan menganiaya pekerja. Walau bagaimanapun, ia tidak boleh dikatakan bahawa dapatan fakta mengenai bukti oleh Mahkamah Perusahaan bukanlah penemuan tribunal yang munasabah yang dalam hal keadaan yang sama tidak akan perolehi (lihat perenggan 12).

(2) Award gaji kebelakang 48 bulan adalah kesilapan undang-undang yang perlu diperbetulkan kerana Pengerusi Mahkamah Perusahaan yang arif gagal untuk mengiktiraf dan memohon corak umum kes-kes dan Practice Note No 1 of 1987 yang relevan yang terpakai kepada fakta kes itu. Award gaji kebelakang 48 bulan yang tinggi tidak disokong oleh sebab yang sah. Ia adalah adil untuk menghadkan award gaji kebelakang kepada amalan yang diwujudkan iaitu mengawardkan 24 bulan dan mempertimbangkan jumlah pampasan yang akan diberikan bagi kehilangan pekerjaan. Responden telah diambil bekerja oleh syarikat sebagai pengurus bagi RPD pada tahun 1996 dan telah dibuang kerja secara konstruktif pada tahun 1999; maka adalah adil untuk mengawardkan jumlah sejumlah wang sebagai pampasan bagi kehilangan pekerjaan berdasarkan sebulan gaji tahun berkhidmat (lihat perenggan 13).]

Notes

For cases on award of the Industrial Court, see 8(1) *Mallal's Digest* (4th Ed 2011 Reissue) paras 1556–1625.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed 2011 Reissue) paras 1037–1098.

Cases referred to

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304, FC (refd)
Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Another [2001] 3 MLJ 529, FC (refd)
Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors [2004] 3 MLJ 339; [2004] 2 CLJ 697, CA (refd)
Nestle Food Store Storage (Sabah) Sdn Bhd v Terence Tan Nyang Yin [2002] 1 ILR 280, IC (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2001] 1 CLJ 9, CA (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 AMR 1601, CA (refd)
Telekom Malaysia Bhd v Ramli bin Akim [2008] 1 MLJ 770; [2008] 1 CLJ 440, CA (refd)
Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713 (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92, FC (refd)
Woods v WM Car Services (Peterborough) [1981] ICR 666 (refd)

Legislation referred to

Industrial Relations Act 1967

Sivabalan N (Suganthi Singam with him) (Shearn Delamore & Co) for the plaintiff.
Edward Saw (Andrew Saw with him) (Ng Yook Woon, Andrew TC Saw & Co) for the defendant.

Mohamad Ariff J:

[1] This was an application for an order of certiorari to quash Industrial Court Award No 5 of 2006 which I allowed in part. I ordered that certiorari be issued to quash the award of backwages of 48 months granted by the Industrial Court.

[2] The brief background facts of the dispute are as follows. The respondent/employee was employed as the manager for the applicant company's recovered paper division ('RPD'). The company was involved in the business of producing recycled newsprint from old newspapers. As the manager for the RPD, the claimant reported directly to the company's managing director, who appeared at the hearing in the Industrial Court as COW1. Sometime in June 1999, several allegations of misconduct were levelled against the claimant, and a domestic enquiry was convened which resulted in the claimant being found guilty of nine of the 19 charges of misconduct. These charges on which he was found liable, related to misrepresentations made by

him and inappropriate payments made by his direction in relation to storage charges for old newspapers. These, according to the company, were serious acts of misconduct. According to the company, although the misconduct committed warranted dismissal, the respondent was transferred to a new, created position of commercial manager-marketing. He was given a proper job description and informed that his salary, grade and other terms and benefits remained the same.

[3] The respondent reported for duty in his new position on 20 September 1999 and worked for three days with the company in this new position until 23 September 1999. By letter dated 23 September 1999, the respondent informed the company that he had treated himself as having been constructively dismissed on the basis that the transfer allegedly amounted to a demotion, and further, he did not accept the findings of the enquiry.

[4] The company denied the allegations and accorded the respondent the opportunity to resume work by 28 September 1999, failing which the company deemed that the respondent had abandoned his employment with the company. The respondent did not resume work as requested by 28 September 1999.

[5] The Industrial Court heard the complaint of constructive dismissal over a period of eight days, and handed down an award which was in favour of the respondent in the abovesaid Award No 5 of 2006. In a very detailed award, the learned Industrial Court chairman concluded the applicant had been constructively dismissed without just cause and excuse and there was clearly a breach of contract on the part of the company which went to the root of the contract of employment. Reinstatement not being appropriate in the circumstances, the Industrial Court ordered that the claimant be paid 48 months salary as compensation for the total sum of RM374,000 (RM7,800 x 48). The Industrial Court awarded this higher sum after considering that the claimant was jobless and had not been gainfully employed since September 2001.

[6] The Industrial Court was of the opinion that the post of commercial manager-marketing was not created in good faith by the company, and it followed that the act of transferring the claimant to that post amounted to a fundamental breach by the company which went to the root of the claimant's terms and conditions of service. The Industrial Court noted that in his former post, the claimant reported directly to the managing director and had some 32–42 employees reporting to him, whereas in the new created post, he reported to the marketing manager who was his own peer when he was the RPD manager, and he had only the export manager reporting to him. There was also reduction of responsibilities, as the claimant was no longer responsible

for any division of the company, and further, he was no longer a member of the senior management executive committee of the company. In this connection, the Industrial Court held:

> In his former post, the claimant reported to COW1, whereas in the letter he was to report to the marketing manager, his peer when he was the RPD manager. In his former post, the claimant had 32–42 employees reporting to him at any one time whereas in the letter, only the export manager reported to him. There was a reduction in responsibilities in that the claimant was no longer responsible for division of the company. On the day he reported to work in the new post, the marketing manager told him that he was on par with other managers reporting to the marketing manager. The marketing manager was not called to rebut the claimant's evidence. The claimant was no longer a member of the senior management executive committee ('EXCO') … required to attend monthly meetings where the important issues within the company were discussed and deliberated with the chairman of the Hong Leong Group of Companies ('HLG').
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> The court accept the evidence of the claimant that the job description for the commercial manager-marketing post was a combination of several functions of the marketing manager and sales manager which they had been performing but found difficult to handle because of lack of time. From the evidence of COW1, it was clear that the commercial manager-marketing post was never filled since the claimant claimed constructive dismissal and … were reallocated to existing staff.
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> The court finds that the created post of commercial manager-marketing was not created in good faith by the company. The act of transferring the claimant in that post amounted to a fundamental breach by the company which goes to the root of the claimant's terms of service. The claimant is therefore justified in claiming that he had been constructively dismissed.

[7] The Industrial Court further held that the claimant had walked out three days after giving the company the benefit of the doubt, and therefore the facts showed he had left the employment within a reasonable time after the breach and thereby did not affirm the contract. As for the domestic enquiry, the Industrial Court held that it had not been held properly and violated the rules of natural justice. In any event, on the facts and evidence adduced, the nine charges had not been sufficiently proved against the claimant. In this regard the Industrial Court held, inter alia, as follows:

> The court is of the view that the domestic enquiry was not held properly and violated the rules of natural justice. COW1, Graham Ogilvie, the person who was the claimant's superior who wrote the memos to the claimant and which memos were the subject matter of the judges, was the prosecuting officer at the domestic enquiry. He was also the main witness at the enquiry …

[8] These were definite findings of the Industrial Court on the evidence, which this court exercising judicial review jurisdiction must be slow to upset, unless these findings are clearly perverse such as to constitute errors of law

requiring correction by the court. The authoritative statement of principles by the Court of Appeal in *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9 has relevance:

> Whether a High Court has exercised appellate functions depends upon the approach taken in a particular case. If the judge to whom application is made for *certiorari* enquires into and disturbs findings of fact based on the credibility of witnesses, he does indeed exercise appellate functions. It is important to remember that in judicial review proceedings the High Court must accept as gospel findings of fact made by the Industrial Court based on credibility of witnesses. As was observed by Mohd Azmi FCJ in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & another appeal* [1995] 2 MLJ 753; [1995] 3 CLJ 344 at p 348:
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> > In exercising judicial review, the High Court was obliged not interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable men body of man could reasonably come to the conclusion … or that the decisions of the Industrial Court looked at objectively, were so devoid of any possible justification that no reasonable person or body of persons could have reached them …
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> It is the ultimate decision of the Industrial Court when looked at as a whole that matters. That is approach suggested by so learned a judge as Mohd Azmi FCJ. It is a view plainly binding upon this court … (at pp 23–24 of the report).

[9] That these are the applicable principles was accepted by counsel for the respondent as well, who quoted the earlier leading decision in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 AMR 1601:

> An inferior tribunal or decision-making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law … If an interior tribunal on the public decision maker does make such error, then he exceeds his jurisdiction. So too his jurisdiction exceeded if resort is to an unfair procedure …, Or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
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> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error not closed. But it may safely be said that an error of law would be disclosed if the decision maker ask himself the wrong question, takes into account irrelevant considerations (what may be conveniently termed as an anisminic error) or if he misconstrues the terms of any relevant statute, misapplies or misstates the principle of the general law.

[10] It was argued before me that the Industrial Court chairman had misconstrued the law on constructive dismissal, took irrelevant matters into consideration, failed to take irrelevant matters into consideration and arrived at a decision which was perverse. It was also argued that the Industrial Court

based its decision on an pleaded case and without due regard to the pleadings of the parties. In particular, it was argued:

(a) the learned chairman had failed to correctly applied the 'the contract test' and thus had misconstrued the law relating to constructive dismissal;

(b) the pleaded case of the claimant was that he was demoted and it was never pleaded that he left because the position was a newly created or non-existent position;

(c) the learned Industrial Court chairman had considered the motives of the company when the company transferred the claimant to the new position. The motives of the company could not be grounds to treat the claimant as constructively dismissed. The reasonableness or motives of the company's actions were completely irrelevant for the determination of whether there was constructive dismissal;

(d) the Industrial Court chairman came to an erroneous conclusion that the transfer amounted to a fundamental breach of contract, since on the law it was part of an employer's prerogatives to transfer an employee;

(e) the Industrial Court chairman had erred in law and acted in excess of jurisdiction when he failed to take into consideration the fact that the claimant had affirmed the alleged breach, since he left his employment only after taking up the new post;

(f) the finding of the Industrial Court that the charges were not established was perverse in light of the evidence before the Industrial Court; and

(g) the award of the backwages was excessive and perverse. The award conflicted with the general practice of the Industrial Court in such matters, and the Industrial Court Practice Note No 1 of 1987 of 29 June 1987, which stipulated:

> (a) back pay from the date of dismissal to date of conclusion of hearing, subject to a maximum of 24 months.

[11] Except for ground No 7 on the excessive backwages, I found no merit as regards the first six grounds enumerated above. The award consisted of one whole section on the law relating to constructive dismissal, in which the learned Industrial Court Chairman had sufficiently addressed and discussed the law, including the rule on affirmation of the contract. The cases of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92, *Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER 713 and *Kontena Nasional* case, in particular were expressly referred to by the Industrial Court chairman. This being the case, I was not persuaded that the Industrial Court chairman allegedly did not apply the 'contract test'. Indeed, the law does recognise the relevance of reasonableness of the company's action, even in the context of

constructive dismissal. As correctly highlighted by counsel for the respondent, the case in point is *Woods v WM Car Services (Peterborough)* [1981] ICR 666, where it was said:

> … The tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

[12] On the point of absence of a pleaded case, it was obvious the respondent had pleaded his unjustified demotion to the created position. As such, it could not be said the pleading was not sufficiently precise. As regards the prerogative of transfer, although it is accepted law that the employer has the prerogative to transfer its employees from one place of work to another, this discretion is not unlimited and can still be tested on the grounds whether it is actuated by any indirect motive or mala fide, or whether it is made for the purpose of harassing and victimising the workman. See the Court of Appeal decision in *Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors* [2004] 3 MLJ 339; [2004] 2 CLJ 697. As far as the findings of the Industrial Court as regards the evidence to support the nine charges were concerned, it is a matter of evaluation of the evidence, and unless clearly perverse in the sense that there was no evidence to support the conclusions of the Industrial Court, to interfere will be to assume appellate jurisdiction on the part of this court. On the facts of this case, it could not be said that the findings of fact on the evidence by the Industrial Court were not findings that a reasonable tribunal similarly circumstanced would not have arrived at.

THE BACKWAGES

[13] I felt that the general award of the Industrial Court Chairman could not be faulted on the various grounds I mentioned earlier. The general conclusion was that it would be wrong for the High Court, in exercise of its judicial review jurisdiction, to interfere and upset an award of the Industrial Court unless it could be established there was an error of law in the sense understood in administrative law. The High Court can interfere where an award is clearly perverse, for instance where the Industrial Court has failed to take into account relevant considerations. Such an error of law can occur if the Industrial Court misconstrues the terms of any relevant statute, or misapplies or misstates the principle of the general law. In relation to the award of backwages, which was ordered on the basis of 48 months, I was of the opinion that this was clearly an error of law which should be corrected since it was clear that the Industrial Court chairman had failed to recognise and apply the general trend of cases and the relevant Practice Note No 1 of 1987 which applied to the facts of this case. No sufficient grounds were given by the Industrial Court to justify this departure from an accepted practice in industrial law jurisprudence. Although

the jurisdiction of the Industrial Court includes an element of discretion in keeping with the aims and objects of the Industrial Relations Act 1967, this discretion is however not unfettered and has to be exercised according to law, and, counsel for the applicant was right to emphasise the decisions in *Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Another* [2001] 3 MLJ 529, *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304, *Nestle Food Store Storage (Sabah) Sdn Bhd v Terence Tan Nyang Yin* [2002] 1 ILR 280 and *Telekom Malaysia Bhd v Ramli bin Akim* [2008] 1 MLJ 770; [2008] 1 CLJ 440 which support the general practice of limiting backwages to a maximum of 24 months.

[14] The Industrial Court chairman appeared to have regarded the delay in the disposal of the complaint through the Industrial Court process was solely attributable to the applicant. With respect, this conclusion was incorrect. I agreed with the argument by the respondent's counsel that the applicant had no control over the events of delay in which the Industrial Court heard the complaint only after lapse of two years from the time of his dismissal. Hearing only commenced in October 2003 but was adjourned because the company's solicitors discharged themselves such that case only proceeded in 2004 and concluded in 2005.

[15] In the circumstances, the high award of backwages of 48 months was unsupported by valid reason. I was of the view, and accordingly held, it would be fair to limit the award of backwages to the established practice of awarding 24 months, and further, to consider the right amount of compensation to be awarded for the loss of employment. The respondent was employed by the company as a manager for the RPD in 1996 and he was constructively dismissed in 1999, meaning a period of three years. It would be fair to award some sum as compensation for loss of employment on the basis of one month's salary for every one year of service. On this basis, I concluded that the award of the Industrial Court should be varied to allow a total compensation of 24 + 3 months of wages at the rate of RM7,800 per month. I accordingly ordered that certiorari be issued to quash that part of the Industrial Court award pertaining to the award of backwages, and the sum awarded by the High Court be substituted for the sum stated therefore.

Application allowed.

Reported by Masrifah Ravendran